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Supreme Court of the United States

OCTOBER TERM 1960

No. 336

WILLARD UPHAUS

v.

THE STATE OF NEW HAMPSHIRE

On Appeal from The Supreme Court of The State of New Hampshire

MOTION TO DISMISS

THE STATE OF NEW HAMPSHIRE

BY: LOUIS C. WYMAN, Attorney General

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PRELIMINARY STATEMENT

Appellee, The State of New Hampshire, by Louis C. Wyman, Attorney General, in conformity with Rule 16 of this Honorable Court, respectfully submits the following Motion to Dismiss the appeal of Willard Uphaus, Appellant, on the grounds specified in said Motion.

MOTION TO DISMISS

I. No substantial Federal question is involved.

Now comes the Appellee, The State of New Hampshire, by Louis C. Wyman, Attorney General, and respectfully moves that the appeal of Willard Uphaus, Appellant, as more particularly described in the Jurisdictional Statement filed by Appellant with this Honorable Court be dismissed on the ground that no substantial Federal question is involved.

The use of the contempt power of the New Hampshire Superior Court for Merrimack County in order to compel compliance by a witness with a subpoena *duces tecum* served upon him by the Attorney General in the course of an investigation of subversive activities in New Hampshire as a legislative committee (New Hampshire Laws 1953, Chapter 307 and Laws 1955, Chapter 197) has been judicially reviewed and approved. *Nelson* v. *Wyman*, 99 N. H. 33. By the subpoena in question the Attorney General sought to require Appellant to produce guest registrations in the New Hampshire World Fellowship Center at Albany, New Hampshire for the 1954 and 1955 seasons. Upon Appellant's refusal to comply with the order for the production of the material he was found and adjudicated in contempt, *Wyman* v. *Uphaus*, 100 N. H. 436, and ordered committed until and unless he should purge himself of his contempt by complying with the Court's order. This order of committal was held valid by this Court in *Uphaus* v. *Wyman*, 360 U.S. 72, 3 L.Ed. 2d 1090, 79 S.Ct. 1040. A further hearing on this matter was held on December 14, 1959 and upon Appellant's continued refusal to comply with the order to produce the guest registrations at the World Fellowship Center for the 1954 and 1955 seasons Appellant was again adjudged in contempt and ordered committed until he should purge himself. Appellant's requests to be admitted to bail before both the Superior and Supreme Courts of the State of New Hampshire and this Court have been uniformly rejected, Frankfurter, J. stating in his denial of the motion for bail on July 7, 1960 with reference to this pending appeal:

"The essential contention on which review is proposed to be sought here is thus a local, nonfederal question howsoever paraphrased in intricate, subtle terms."

A further application for bail presented to Mr. Justice Douglas and by him referred to the Court was also denied on September 2, 1960.

There is no substantial Federal question involved in any of the several aspects of this case.

A. No basis exists for a reconsideration by this Court of its decision of June 8, 1959 (360 U.S. 72) a rehearing of which was denied (361 U.S. 856) October 1959.

This Court in its decision of June 8, 1959, supra, upholding the validity of the contempt adjudication, in commenting on the legislative directive stated:

"The Attorney General was commissioned to determine if there were any subversive persons within New Hampshire. The obvious starting point of such an inquiry was to learn what persons were within the State. It is therefore clear that the requests relate directly to the Legislature's area of interest, i.e., the presence of subversives in the State, as announced in its resolution." (360 U.S. 78)

and at Page 79:

"The nexus between World Fellowship and subversive activities disclosed by the record furnished adequate justification for the investigation we here review . . . The investigation was, therefore, undertaken in the interest of self-preservation, 'the ultimate value of any society,' *Dennis* v. *United States*, 341 U.S. 494, 509 (1951). This governmental interest outweighs individual rights in an associational privacy which, however real in other circumstances, cf. *National Association for the Advancement of Colored People* v. *Alabama*, supra, were here tenuous at best."

Further the continued interest of the New Hampshire Legislature and desire for this information was confirmed in *Wyman* v. *Uphaus*, 101 N. H. 139:

> "The legislative history (of New Hampshire laws 1955, Chapter 197) makes it clear beyond a reasonable doubt that it did and does desire an answer to these questions."

This was reaffirmed by the New Hampshire Supreme Court on March 31, 1960 (102 N.H. 461) in its decision overruling Appellant's exceptions to the judgment of contempt and committal order of the Merrimack County Superior Court wherein the court said:

> "The series of statutory enactments on the subject of subversive activities indicates the legislative purpose to continue the Attorney General's authority to investigate subversive activities and not end it when his power expired under chapter 197, Laws 1955. No clearer indication of this is needed than the enactment of chapter 178, Laws 1957, effective June 14, 1957, establishing a permanent authority in the Attorney General two weeks before the date of expiration of his temporary authority. The Legislature has thus shown a live and continuous interest in this subject matter."

and concluded:

> "The constitutionality of the act under which the State proceeded against the defendant (Const. Pt. I, *Art.* 37th) has heretofore been decided and no reason is presented sufficient to warrant re-examination of the subject. See *Nelson* v. *Wyman*, 99 N. H. 33."

Allegations of federal unconstitutionality have been made and disposed of adversely to Appellant in previous litigation. No amount of applied ingenuity of new and additional counsel can alter the fact that Uphaus has had his day in court on all constitutional issues, *ad nauseam*. See: *Wyman* v. *Uphaus*, 100 N.H. 1; *Wyman* v. *Uphaus*, 100 N.H. 436; *Uphaus* v. *Wyman*, 355

U.S. 16; *Uphaus* v. *Wyman*, 356 U.S. 925, 965; *Wyman* v. *Uphaus*, 101 N.H. 139; *Uphaus* v. *Wyman*, 360 U.S. 72; *Wyman* v. *Uphaus*, 102 N.H. 324; *Wyman* v. *Uphaus*, 102 N.H. 461, 159 A.(2d) 160.

There is nothing in the present status of the cause before this Court by *this* appeal that was not already at issue and available to Appellant when this case was argued before the Supreme Court of the United States in November of 1958. The statements contained in the Appellant's Jurisdictional Statement relating to alleged suggested criminality or vilification of persons attendant at World Fellowship, Inc., are, of course, without foundation in fact or in law, as Appellant and his counsel well know. The matter is one of fact-finding investigation and not prosecution. No question of guilt or innocence is here—merely what are the facts. In noting that Appellee had valid reason to believe that the speakers and guests at World Fellowship might be subversive persons within the meaning of the New Hampshire Act this Court said at Pg. 79:

> "The record reveals that appellant had participated in 'Communist front' activities and that '[n]ot less than nineteen speakers invited by Uphaus to talk at World Fellowship had either been members of the Communist Party or had connections or affiliations with it or with one or more of the organizations cited as subversive or Communist controlled in the United States Attorney General's list.' 100 N.H. at 442, 130 A.2d, at 283. While the Attorney General's list is designed for the limited purpose of determining fitness for federal employment. *Wieman* v. *Updegraff*, 344 U.S. 183 (1952), and guilt by association remains a thoroughly discredited doctrine, it is with a legislative investigation—not a criminal prosecution—that we deal here. Certainly the investigatory power of the State need not be constricted until sufficient evidence of subversion is gathered to justify the institution of criminal proceedings." *Uphaus* v. *Wyman*, 360 U.S. 72, 79, 3 L. Ed. 2d 1090, 79 S.Ct. 1040.

Fact finding investigation by the State legislature in fur-

therance of a legitimate end is a valid exercise of an accepted legislative power.

Kilbourn v. *Thompson*, 103 U.S. 168, 26 L.ed. 377, 13 Otto 168

McGrain v. *Daugherty*, 273 U.S. 135, 71 L.ed. 580, 47 S.Ct. 319

Sinclair v. *U.S.*, 279 U.S. 263, 73 L.ed. 692, 49 S.Ct. 268

Jurney v. *McCracken*, 294 U.S. 125, 79 L.ed. 802, 55 S.Ct. 375

Further, it is to be noted that New Hampshire law requires that all persons operating a public camp maintain a register of guests which shall be open to inspection of sheriffs and police officers. (N.H. Rev. Stat. Ann. 353:3) World Fellowship was operated as a public camp furnishing both board and lodging to persons applying therefor.

B. The New Hampshire Legislature's continuation of legislation in this field has not restricted the scope of investigation in this or future cases.

It is urged by Appellant that the permanent legislation (RSA 588:8-a) enacted in 1957 (Laws 1957, chapter 178) in some manner envisions a different scope of investigation because it refers to violations of RSA 588, omitting the words "and to determine whether subversive persons as defined in said act are presently located within this state." The New Hampshire Supreme Court has repeatedly held that the construction of a statute will not be changed by alterations or omissions which are designed to render the provisions more concise.

Noyes v. *Marston*, 70 N.H. 7

Unity v. *Pike*, 68 N.H. 71

Cocheco v. *Strafford*, 51 N.H. 455

Colby v. *Stevens*, 38 N.H. 191

The permanent legislation (not here involved in any event) was drafted by Appellee as were all earlier resolutions of investigation. The words urged as so significant by Appellant were deleted as redundant. The fact of redundancy is obvious from an examination of RSA 588, inasmuch as both "subversive person" and "subversive organization" are defined in said Act, and an investigation of "violations" *a fortiori* requires an investigation to first determine whether such persons are in New Hampshire. The New Hampshire Supreme Court in *Nelson* v. *Wyman*, 99 N.H. 33 at page 37 indicated that the definition of subversive person in what is now RSA 588 might include persons to whom no criminality attached by virtue of the fact that they might extend to unknowing members of subversive organizations, but investigation to arrive at their state of mind (indispensable before there can be a criminal violation) is as much required when seeking to ascertain whether there have been violations of the act as it is "and to determine whether persons as defined in said act are presently located within this state." Further, it is significant, as pointed out in the decision of the New Hampshire Supreme Court in *Uphaus* v. *Wyman* decided June 27, 1960, that these statutory changes in the new permanent legislation have no bearing on the Appellant's position as "[t]he plaintiff stands committed for refusal, while Laws 1955, c. 197 was still in effect, to comply with an order entered prior to enactment of RSA 588:8a." Frankfurter, J. in commenting on this decision in his denial of Appellant's Motion for Bail on July 7, 1960 stated:

> "The contention which the New Hampshire Supreme Court thus rejected turns of course on the construction of New Hampshire law by the New Hampshire Supreme Court. Nor is there any suggestion that in construing the law of New Hampsaire as it did, the New Hampshire Supreme Court placed an inexcusable construction upon New Hampshire enactments in order to evade or defeat a federal right."

Appellant has refused to produce two small packets of cards with the names of guests. These cards are in existence. They

are available—yet Appellant not only did not bring them with him to court but had no intention of doing so in the present proceeding even though ordered to do so by the Court. The relevancy of these registrations to the investigation has been affirmed in *Wyman* v. *Uphaus*, 100 N.H. 436, and by this Honorable Court in *Uphaus* v. *Wyman*, 360 U.S. 72, 79, 3 L.Ed.2d 1090, 79 S.Ct. 1040:

> "Moreover, the Attorney General had valid reason to believe that the speakers and guests at World Fellowship might be subversive persons within the meaning of the New Hampshire Act. The Supreme Court of New Hampshire found Uphaus' contrary position 'unrelated to reality.' Although the evidence as to the nexus between World Fellowship and subversive activities may not be conclusive, we believe it sufficiently relevant to support the Attorney General's action . . ."

Persistent refusal to obey a lawful order of our courts cannot pass unchallenged by any judicial system worthy of the name, particularly after complete and thorough judicial review has upheld the validity of the order.

Davis v. *U.S.*, 269 F.2d 357

Orman v. *U.S.*, 207 F.2d 148

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186

State of Ohio v. *Morgan*, 164 Ohio St. 529, 133 N.E.2d 104

See *U.S.* v. *United Mine Workers*, 330 U.S. 258, 91 L.Ed 884, 67 S.Ct. 677 wherein the Court said in upholding the restraining order:

> ". . . They had full opportunity to comply with the order of the District Court, but they deliberately refused obedience and determined for themselves the validity of the order . . . Their conduct showed a total lack of respect for the judicial process."

d at 311,312 where the Court said:

"When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy.

". . . If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. . . "

None of the questions presented or alleged to be presented the Jurisdictional Statement to which this Motion to Diss is addressed present any federal question of substance.

CONCLUSION

All that is here involved is a situation in which Appellant liberately, wilfully and against the advice of his own counsel tinues to refuse to obey the lawful and constitutional order a state court confirmed by the Supreme Court of the United ates. If the processes of the judiciary are to have any real ality, one who has exhausted his appellate review and still fuses to abide by the civil orders of a court of appropriate risdiction must meet the full action of the contempt power of at court. As has been pointed out in the majority opinion in *phaus* v. *Wyman*, 360 U.S. 72, 81, 3 L.ed 1090, 79 S.Ct. 1040 which none of the Justices of this Honorable Court dissented d which language originated in an opinion of Mr. Justice ack):

". . . we are not at all concerned with the power of the courts to impose constitutional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees."

Throughout the proceedings in this and related Uphaus ca the most extraordinary and unfounded claims of abuse on t part of the Attorney General of New Hampshire (acting as delegated legislative fact-finding committee) have been ma by Appellant and/or his counsel. The sweep of these claims e tended to and appeared in Mr. Justice Brennan's dissent in t original Uphaus case [*Uphaus* v. *Wyman* 360 U.S. 72, 8 where it was urged that this matter involved a pernicious pra tice of exposure for exposure's sake. As appears in the recor including the first report of the committee on January 5, 195 there has been no exposure for exposure's sake in this or oth cases in New Hampshire. Names of persons have not been i discriminately bandied before the public. Reputations have n been smeared. In fact (as required by self-imposed Rules o Procedure) proceedings have been in executive session in a cases except where the witness has requested a public hearin or it has been necessary to transfer the matter to court t compel a recalcitrant witness to give information to which th Legislature is entitled.

No one knows better than Appellant and his counsel that th names requested by the committee are not released to the pres nor to the public under the Rules of Procedure. All who at tended World Fellowship, Inc. are not, *per se,* cursed with some plague because of having been there and no one in his right mind seeing the entire roster would think otherwise. However, it is indisputable that some persons presently or formerly mem bers of the Communist Party were there and were active there, and that Appellant has worked closely with them, ranging from inviting them originally to conferring with them there at length. Such facts are a reasonable and rational concern of the New Hampshire Legislature. They are a reasonable and rational con cern of all thinking Americans who can see as far as ninety miles off the Florida Coast. As this Motion to Dismiss is writ ten, reliable information indicates that a substantial geogra phical portion of the island of Cuba has been blocked off to all persons except upon a pass from the Castro government. What

is being done in these areas or how far Soviet agents or assistants are being employed there is of course in the first instance a matter for the primary concern of the federal authorities. Nevertheless, the community of interest which has in the last analysis impelled urging this Honorable Court to permit state and federal authorities to work together in this delicate and difficult field of keeping abreast of subversion, is every bit as significant in relation to Cuba and New Hampshire as it is in relation to Latin America and the Soviet Union.

In the light of world history and current events it behooves this nation and every state in this nation without persecution and in the exercise of carefully considered and applied constitutional method to keep up with what present or former members of the Communist Party are doing in this country. On this point there can be no question if we and our friends are to survive as free nations.

Those who voluntarily and knowingly appear with, consult with, confer with, attend functions with and otherwise act in concert with Communists or former Communists in America cannot possibly have any reasonable right of privacy in regard to such activities in light of this public record, which proves conclusively that Communism (spelled with a capital C) and its leadership is the mortal enemy of the United States of America, the State of New Hampshire, and the Supreme Court of the United States.

It is respectfully submitted that no new substantial federal question not previously considered by this Honorable Court is presented by the present Jurisdictional Statement no matter the ability of any newly employed counsel nor their diligence in seeking to create within a vacuum such issues by a new combination of words and phrases.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
By: LOUIS C. WYMAN, Attorney General

September 15, 1960.